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No. 493

In the Supreme Court of the United States

OCTOBER TERM, 1944

IDAHO POTATO GROWERS, INC., W. P. WILSON, L. S. TAUBE, TED TAUBE AND L. B. HOLDEN, CO-PARTNERS, DOING BUSINESS AS L. S. TAUBE & COMPANY; MEYER FRIEDMAN AND ARTHUR E. FRIEDMAN, CO-PARTNERS, DOING BUSINESS AS G. FRIEDMAN & SONS; IDAHO FALLS WAREHOUSE COMPANY; ROWENAE O'NEIL, ADMINISTRATRIX OF THE ESTATE OF J. E. O'NEIL, DECEASED; A. G. STUART; C. R. HOLDEN AND L. L. HOLDEN, CO-PARTNERS, DOING BUSINESS AS HOLDEN'S HOOTCHES AND IDAHO TRAFFIC ASSOCIATION, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.



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OPINIONS BELOW

The opinion of the court below (R. 749) is not yet reported. The findings of fact, conclusions of

law, and order of the National Labor Relations Board (R. 68–149) are reported in 48 N. L. R. B. 1084.

JURISDICTION

The decree of the court below (R. 798–803) was entered on June 30, 1944. The petition for a writ of certiorari was filed on September 23, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether individuals employed to perform the work of sorting, grading, weighing, and sacking potatoes for dealers who market potatoes are within the exemption of an "agricultural laborer" under Section 2 (3) of the National Labor Relations Act.[1]

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[1] While certain other questions are suggested by the petition, they were not raised below and hence are not properly presented. In any event, petitioners' contention (Pet. 13) that the Board order, as enforced, deprives the growers whose potatoes they process, of the right of free speech is particularly without merit since petitioners may not urge the grievances of others. *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 558. See also *infra*, note 10. And the complaint as to the vagueness of the order and decree (Pet. 14; Br. 33–37) is equally insubstantial. See *infra*, note 16. If the issue of improper joinder may be said to have been raised below (R. 161, par. 16), albeit obscurely, especially in the absence of a clear showing of prejudice we submit that this is not a question, review of which is warranted.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

> SEC. 2 (3). The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.
>
> SEC. 10. * * *
>
> (e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

Upon charges filed by the Union [2] (R. 5–27) and upon the usual proceedings, the Board, on April 10, 1943, issued its findings of fact, conclusions of law, and order (R. 68–149). The facts as shown by the evidence, may be summarized as follows:

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[2] Teamsters, Chauffeurs, Warehousemen and Helpers, Local 183, affiliated with the American Federation of Labor.

Petitioners, nine in number,[3] are, with the exception of the Traffic Association, dealers in potatoes in Idaho Falls, Idaho and vicinity.[4] Peti-

[3] (1) Idaho Potato Growers, Inc., an Idaho corporation (herein called "Potato Growers"); (2) W. P. Wilson; (3) L. S. Taube & Company, a partnership consisting of L. S. Taube, Ted Taube, and L. B. Holden (herein called "Taube"); (4) J. Friedman & Sons, a partnership consisting of Meyer Friedman and Arthur E. Friedman (herein called "Friedman"); (5) Idaho Falls Warehouse Company, an Idaho corporation (herein called "Warehouse Company"); (6) Rowenah O'Neil, Administratrix of the Estate of J. E. O'Neil, deceased (herein called "O'Neil"); (7) A. G. Stuart; (8) Holden Brothers, a partnership consisting of C. R. Holden and L. L. Holden (herein called "Holden"); and (9) Idaho Traffic Association, an Idaho corporation (herein called "Traffic Association"). Petitioner Rowenah O'Neil, Administratrix of the Estate of J. E. O'Neil, operates the business formerly conducted by J. E. O'Neil, who died in August 1942 (R. 277). Petitioner Holden operates the produce business formerly conducted by Holden Brothers, Inc., an Idaho corporation, which was dissolved on about June 30, 1942. The two partners in petitioner Holden were two of the three stockholders in the corporation and managed its business until the dissolution, when they formed the petitioning partnership (R. 181–186). The Board found petitioner Holden and O'Neil chargeable under the Act with the unfair labor practices of Holden Brothers, Inc. and J. E. O'Neil, respectively (R. 136–137) and, in each instance, we refer to the predecessor as well as petitioner as "petitioner."

[4] Petitioner Traffic Association is an Idaho corporation with its office at Idaho Falls (R. 296). It was organized for the purpose of assisting shippers with respect "to traffic problems of all kinds, and matters arising out of the preparation, inspection, sale and shipment of merchandise and commodities of whatsoever nature" (R. 733). All petitioner dealers and about seven other potato dealers and shippers hold memberships in the Traffic Association (R. 296–297).

tioner Taube is a partnership with its principal office in Kansas City, Missouri (R. 209–210). This petitioner grows no potatoes but maintains warehouses at Idaho Falls and Shelley, Idaho, for the handling of potatoes which it buys from both growers and dealers for resale (R. 209, 211). During the 1941–1942 season, when the unfair labor practices took place, it sold and shipped from these warehouses approximately 1,000 carloads of potatoes (R. 525). In February 1942, it employed 70 workers in its Idaho Falls and Shelley operations (R. 287–289).

Petitioner Friedman is engaged in the general produce business in various States and maintains a warehouse at Idaho Falls for the handling of potatoes (R. 275). It grows no potatoes but purchases them from growers and other dealers. During the 1941–1942 season, it sold and shipped from its Idaho Falls warehouse approximately 360 carloads of potatoes (R. 275), and, in February 1942, employed 23 workers (R. 290).

Petitioner Warehouse Company, among various business enterprises conducted by it at Idaho Falls, maintains a warehouse for the handling of potatoes (R. 261–263). It grows no potatoes but buys them from growers and dealers for resale and also at times acts as an agent in the handling of potatoes for growers (R. 263–266). About 65 to 85 percent of the potatoes handled by it during the 1941–1942 season were purchased by it for

resale (R. 267–268). During that season, this petitioner shipped approximately 700 carloads of potatoes (R. 268) and in February 1942, employed 23 workers of the type whose status is here in issue (R. 291).

Petitioner O'Neil maintains a warehouse at Idaho Falls for handling potatoes (R. 292). During the 1941–1942 season when the unfair labor practices were committed, this petitioner grew no potatoes [5] but bought from growers and other dealers from 800 to 900 carloads of potatoes (R. 277). In February 1942, its pay roll numbered 31 employees (R. 292–293).

Petitioner Stuart owns and operates a warehouse at Shelley, Idaho (R. 293). He handles, in the course of his operations at Shelley, potatoes grown by both himself and other growers. During the 1941–1942 season, about 95 percent of the potatoes handled by him were bought from other growers (R. 276). During the same season, he sold and shipped approximately 200 carloads of potatoes (R. 276). In February 1942, he employed 10 workers (R. 293).

Petitioner Holden owns and maintains a warehouse at Idaho Falls where it handles potatoes and operates a general produce business (R. 182–183). During the 1941–1942 season it grew no

[5] During the 1942–1943 season, subsequent to the unfair labor practices, petitioner O'Neil began to grow potatoes which formed between 10 and 15 percent of the total amount packed by petitioner (R. 277).

potatoes and sold 739 carloads of potatoes acquired from growers (R. 513).[6] In February 1942, its pay roll included 37 workers (R. 294).

Petitioner Wilson maintains a warehouse for the handling of potatoes at Firth, Idaho (R. 275). Between 10 and 15 percent of the 450 carloads of potatoes shipped by this petitioner during the 1941–1942 season were grown by himself and the remainder was bought by him from other dealers and growers for resale (*id.*). In February 1942, he utilized the services of 26 workers (R. 286).

Petitioner Potato Growers is a cooperative association which sorts, packs, ships, and sells potatoes both for its members and other growers (R. 234–237). It also markets, in carload lots, potatoes acquired from other dealers (R. 237). It carries on a substantial portion of its operations in the vicinity of Idaho Falls and Shelley and maintains a warehouse at each of these places (R. 243, 255). During the 1941–1942 season, it shipped approximately 1,300 carloads of potatoes in the course of its operations in these vicinities (R. 254–255). In February 1942, it employed 111 potato workers (R. 280–284).

[6] Subsequent to the unfair labor practices, during the 1942–1943 season which was prior to the Board hearing, this petitioner shipped 106 cars of potatoes, of which 71 cars were grown on land owned or leased by petitioner and the remainder purchased by petitioner from other growers (R. 513).

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In connection with the above-described business of handling potatoes, either as dealers or sales agents, petitioners, other than the Traffic Association, sort, grade and pack potatoes of growers and other dealers, and, for that purpose, maintain suitable equipment and regular staffs of potato workers, called warehouse and cellar crews, these being the employees, approximately 331 in number, whose status is here in issue (R. 212–213, 273–274). Almost all of the potatoes acquired by petitioner dealers are processed by these workers rather than by the growers or their employees (R. 211, 270–271, 276–277).[7]

Much of the work of the crews is not only specialized, but must be done very rapidly and expertly (R. 582). Training and experience are necessary for many operations, especially for those of the head sorter, who normally has had from two to four years of experience at the other jobs on the sorter machine before attaining that position (R. 538–540, 581–585). Thus, the sorters must be able to distinguish quickly between the "Number 1" and "Number 2" grades of pota-

[7] The status of those employed by the grower who sells his potatoes to petitioner dealers already processed is not here in issue. On occasion when petitioners prepare the potatoes for market, the grower may furnish one or more farm hands to assist temporarily in the work, but these hands enter into no relationship with petitioner dealers, are not carried on their pay rolls as are the regular potato workers, and are not involved in the instant proceeding (R. 240–241, 585–586, 609–610).

toes, to detect wire worm, and to save potatoes in certain instances by a process known as "clipping" (R. 581–584). Upon them rests the responsibility for avoiding rejection of potatoes on government inspection after they have been finally packed (R. 582). Likewise, although to a lesser degree, the jiggers and sewers must have experience and training in order properly to pack, weigh, and sew the potato sacks (R. 584–585). Although the potato workers are seasonal employees, it is established practice for the dealers, upon application at the beginning of each season, to rehire satisfactory employees from the preceding season (R. 198, 223, 246–247).

The work of the dealers' crews may be done and is done either at the dealers' warehouses or in the growers' cellars "in the country" (R. 190, 196, 218–219, 514, 540–541). During a rush period of approximately four to six weeks in the fall of the year, much of the work is done from start to finish in the dealers' warehouses (R. 514). When the crews work in the farmers' cellars, they frequently give the potatoes only a rough sorting, known as "roughing" or "scalping" (R. 508), pack them temporarily in "dump" bags owned by the growers or rented to them by the dealers (R. 532–533, 715), and truck them to the dealers' warehouses, where the culls are removed, a more careful grade is made, and the potatoes are finally packed for shipment (R. 190–191, 217–219, 241–

243, 274).[8] In many instances, the potato workers also wash the potatoes at the warehouse after a preliminary "roughing" in the country (R. 191, 218, 243).

Whether they work in the dealers' warehouses or in the farmers' cellars, the potato workers are under the supervision of the dealers' warehouse foremen, and when working "in the country" they are also under the immediate direction of the dealers' crew foremen, who accompany them to the growers' farms (R. 220, 248). These supervisors have the usual powers and responsibilities of foremen with respect to the potato crews, including the direction of their work and, at least in some cases, the power to hire and fire (R. 248, 656). The farmers have no control or supervision over the workers' operations, although they frequently watch the grading and sorting of their potatoes; the attention which the grower thus directs to the grading process is merely to assure himself of fair treatment at the hands of the dealer's crew, of grading that is not too strict, and of handling costs that are not inflated by slow or

[8] During the 1941–1942 season, approximately 70 to 75 percent of the potatoes handled by petitioner Friedman's country crews received only a rough sorting "in the country" and were finally sorted and packed at the warehouse (R. 276). In the cases of petitioners Warehouse Company, Wilson, and Stuart, the corresponding percentages were, respectively, 60 percent, 50 percent, and 40 percent (R. 269–270, 275, 276–277).

inefficient work (R. 228–230, 249–250, 587–588, 608–609, 661–663).[9] When the performance of the crew displeases the farmer, his course usually is to complain to the foreman; if unreconciled to the foreman's disposition of the complaint, to appeal from the foreman's adverse decision to the dealer's manager or other representative; and occasionally, to have the crew stop working until a responsible representative of the dealer comes to the farm to adjust the farmer's grievance (R. 228–230, 249–252, 257–258, 661–663). Ultimate decision rests with the dealer, however, not with the farmer (R. 257–258) who, in attempting to see to it that the work of the crews is done in a manner most favorable to his own interests, merely exerts upon the crews' employer, the dealer, the normal influence of a "customer" (R. 668–669, 675–676).

The Board found that the potato workers are not agricultural laborers within the meaning of the Act (R. 70, 92), that all the petitioners refused to bargain collectively with the Union, which was the representative designated by a

[9] The price which the grower receives for his crop is subject to reduction in the amount of the sorting and packing costs incurred by the dealer, who normally pays the wages of the potato workers and deducts the amount of the payment from the price which would otherwise be payable to the growers (R. 273, 190–191, 193–194, 233, 664–665, 692–693). Occasionally, a grower pays the wages of a member of a regular crew of potato workers with his own check (R. 693).

majority of the employees in appropriate bargaining units, in violation of Section 8 (5) of the Act, and, that by this and other conduct,[10] petitioners interfered with, restrained, and coerced the potato workers in violation of Section 8 (1) of the Act (R. 70, 98–99, 134–139). It further found that petitioner Taube had discriminatorily discharged employee Moore, and petitioner Potato Growers had discriminatorily discharged employee Rash in violation of Section 8 (1) and (3) of the Act (R. 70, 103–104, 117).[11]

The Board ordered petitioner dealers, and the Traffic Association when acting as an agent for, or in the interest of, petitioner dealers, to cease and desist from their unfair labor practices, and to bargain collectively, upon request, with the Union. It also ordered petitioners Taube and Potato Growers, respectively, to pay appropriate back pay to employees Moore and Rash[12] and required all petitioners to post notices (R. 71–76).

On July 8, 1943, petitioners filed a petition in the Circuit Court of Appeals for the Ninth Circuit to review and set aside the Board's order (R. 150–162). The Board requested dismissal of

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[10] It was petitioners' instigation of farmers' protest meetings which the Board treated as evidence of unfair labor practices, and not the protest speeches themselves.

[11] The Board dismissed the complaint insofar as it alleged discrimination as to the tenure of five additional employees (R. 76).

[12] Neither of these employees desired reinstatement (R. 601, 615).

the petition for review and enforcement of its order (R. 163–172). On June 30, 1944, the court below handed down its decision and decree enforcing the Board's order in full (R. 749–791, 798–803) and on July 14, 1944, District Judge Fee filed a concurring opinion (R. 791–797).

ARGUMENT

The Board and the court below, upon full consideration of the relevant facts, determined that the petitioner dealers' crews of potato workers are not agricultural laborers within the meaning of Section 2 (3) of the Act. The result is in plain accord with the Congressional intent and no conflict of decisions is raised by the court's holding, which follows the reasoning of its earlier decisions in *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76, certiorari denied, 310 U. S. 632, rehearing denied, 311 U. S. 724, and *National Labor Relations Board* v. *Tovrea Packing Co.,* 111 F. (2d) 626, certiorari denied, 311 U. S. 668.

The above-detailed facts show that the sorting, grading, and packing of potatoes is not primarily an incident of agriculture but is an aspect of a marketing process. The employees whose status is here in issue are not in the service of farmers but of merchant-shippers, only a few of whom are also engaged in growing potatoes.[13] The portion

[13] The pattern defined by the facts herein is typical. "Probably 85 percent of the [Idaho potato] shipments are graded

of the work which is done in the farmer's cellar is functionally coherent with the warehouse operation and is performed by the same employees and for the same employers as is the warehouse operation.[14] Whether the work is done in cellar or warehouse, it is an integral part of a marketing process which is financed and administered by dealers. Nor may the work be assimilated into the sphere of agriculture by the fact that, in some instances, final grading and sorting are completed in the farmer's cellar.[15] Indeed, the fact that the farmer confides the preparation and marketing of his potato crop to a specialist even when the work may be done on his own premises further emphasizes its non-agricultural character.

The workers here involved are engaged in a specialized and integrated operation wholly divorced from the raising and harvesting of the

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and sized by dealers or contract crews hired by them, and 15 percent by growers." Park, *Marketing the Late Crop of Potatoes* (U. S. Department of Agriculture, Circular No. 475, 1938), p. 35.

[14] The Board included both warehouse and cellar crews in an appropriate unit (R. 70–71, 120–121). The scope of the unit is entirely clear and petitioners' suggestion that it is ambiguous (Br. 34–37) is urged here for the first time. In their answer petitioners admitted the appropriateness of a unit comprising warehouse and cellar crews (R. 62), as alleged in the complaint (R. 52–53).

[15] The prevailing practice in Idaho is to regrade the potatoes in warehouses over power sorters before loading. See Sherman, Fiske and Park, *Marketing Late-Crop Potatoes* (U. S. Department of Agriculture, Farmers Bulletin No. 1578, 1929), p. 30.

potato crop.[16] It is forwarded not by the casual labor of a versatile farm hand but by an experienced corps of workers who are regularly engaged for the work. It is a mechanized operation and those who perform it are, in contrast to agricultural laborers,[17] paid at an hourly rate (R. 728–730), as is usually the case with industrial labor. All of the incidents of their relationship are appropriate subjects for collective bargaining. Compare *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76 (C. C. A. 9), certiorari denied, 310 U. S. 632, rehearing denied, 311 U. S. 724.

In applying the Act to the instant employees, the Board has sought to preserve a distinction, long developed in its administrative experience[18]

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[16] See Report of the Federal Trade Commission, *Agricultural Income Inquiry* (Gov't. Print. Off., 1938), Part II, p. 345; Park, *op. cit., supra,* at p. 10.

[17] See, for example, Reports and Analysis Division, War Manpower Commission, *Idaho Agricultural Labor Reports* (Boise, Idaho, 1943).

[18] See, for example, the following cases holding employees not to be agricultural laborers: *Matter of American Fruit Growers,* 10 N. L. R. B. 316, 326–329; *Matter of George G. Averill,* 13 N. L. R. B. 411; *Matter of Grower-Shipper Vegetable Ass'n of Central California,* 15 N. L. R. B. 322, enforced in 122 F. (2d) 368 (C. C. A. 9) (lettuce packers); *Matter of North Whittier Heights Citrus Fruit Association,* 10 N. L. R. B. 1269, 1277–1284, enforced in 109 F. (2d) 76 (C. C. A. 9), certiorari denied, 310 U. S. 632, rehearing denied, 311 U. S. 724; *Matter of Sierra Madra-Lamanda Citrus Ass'n,* 23 N. L. R. B. 143; *Matter of Upland Citrus Ass'n.,* 24 N. L. R. B. 1136; *Matter of Corona Citrus Ass'n,* 25 N. L. R. B. 77; *Matter of Jameson Co.,* 25 N. L. R. B. 64; *Matter of Sea-*

as well as in authoritative texts[19] between those who perform agricultural labor and those who are engaged in the marketing and processing of agricultural products. The language of the Act warrants this differentiation and where Congress has sought to eliminate it, it has done so in unmistak-

board Lemon Ass'n., 28 N. L. R. B. 273; *Matter of Saticoy Lemon Ass'n.*, 28 N. L. R. B. 1214 (employees of cooperative associations composed of growers who pack and grade citrus fruit); *Matter of Tovrea Packing Co.*, 12 N. L. R. B. 1063, enforced in 111 F. (2d) 626 (C. C. A. 9), certiorari denied, 311 U. S. 668 (cattle feeders who prepare cattle for market); *Matter of California Walnut Growers Exchange*, 18 N. L. R. B. 493 (walnut shellers at plants owned by walnut growers' cooperative marketing association); *Matter of Antonio Tomasello*, 46 N. L. R. B. 375 (tomato packers who pack grower's tomatoes as well as those purchased by him from others and some of whom have participated in the planting and raising of the tomatoes); *Matter of Newday Seeds*, 55 N. L. R. B. 1049 (seed processors; fact that employees work as farm hands during certain seasons of the year does not change their status when engaged in processing); *Matter of American Food Products Corp.*, 55 N. L. R. B. 654 (workers in potato dehydrating plant); *Matter of J. R. Simplot*, 55 N. L. R. B., No. 223 (potato sorters and graders held to be employees of dealers; head sorter is not an independent contractor but employee of dealers).

Cases holding employees to be agricultural laborers; *Matter of Stark Bros. Nurseries & Orchards Co.*, 40 N. L. R. B. 1243 (employees engaged in fertilizing, cultivating, and harvesting crops and nursery stock); *Matter of Saticoy Lemon Ass'n*, 41 N. L. R. B. 243; *Matter of Seaboard Lemon Ass'n*, 41 N. L. R. B. 248 (lemon pickers engaged at growers' orchards in the harvesting of lemons); *Matter of H. J. Heinz Co.*, 49 N. L. R. B. 573 (employees engaged in growing tomatoes); *Matter of Kennecott Copper Corp.*, 51 N. L. R. B. 1140, 1152–1153 (dairy field hands).

[19] U. S. Department of Agriculture, Circular No. 94, *Farmers' Cooperative Associations in the United States, 1929*

able terms as in the Fair Labor Standards Act[20] and the 1939 amendments to the Social Security Act.[21]

Finally, "where the question", as here, "is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited"; "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 131.

(Gov't Print. Off., 1929), p. 3; Clark and Weld, *Marketing Agricultural Products in the United States* (New York, 1932), p. 3; Huebner, *Agricultural Commerce* (New York, 1924), p. 1; U. S. Department of Commerce, Bureau of the Census, *Census of Business: Wholesale Distribution: 1935*, Vol. I, p. 45; U. S. Department of Labor, Wage and Hour and Public Contracts Divisions, *Memorandum to Industry Committee No. 62 For The Fruit and Vegetable Packing and Farm Products Assembling Industry* (New York, 1943).

[20] Sec. 13 (a) (10), 52 Stat. 1067, 29 U. S. C. 213 (a) (10).

[21] Sec. 209 (b) (1), (l) (4), 53 Stat. 1373, 42 U. S. C. 409 (b) (1), (l) (4). In 1943, the Idaho legislature expanded the agricultural labor definition, which had theretofore been confined to employees of the farm operator and to marketing activities incident to the ordinary farming operations of the farmer himself, to include the broader exemption contained in the 1939 amendments to the Social Security Act. Compare Idaho S. L., Ch. 182, Sec. 18–5 (f), pp. 392–394, with 1943 Idaho S. L., Ch. 29, pp. 60–61.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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